No. 90-147

In the Supreme Court of the United States

OCTOBER TERM, 1990

DENNIS FRYMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

Whether 33 U.S.C. 702c, which provides that "[n]o liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place," bars petitioner's action under the Federal Tort Claims Act for damages arising from injuries suffered in a lake included in a federal flood control project.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	5
Conclusion	13

TABLE OF AUTHORITIES

Cases:

Boyd v. *United States*, 881 F.2d 895 (10th Cir. 1989) 11, 12

Dawson v. *United States*, 894 F.2d 70 (3d Cir. 1990) 8, 9, 10

Dewitt Bank & Trust Co. v. *United States*, 878 F.2d 246 (8th Cir. 1989), cert. denied, 110 S. Ct. 1318 (1990) 8-9, 10

Hayes v. *United States*, 585 F.2d 701 (4th Cir. 1978) 7, 12

James v. *United States*, 760 F.2d 590 (5th Cir. 1985), rev'd, 478 U.S. 597 (1986) 6

McCarthy v. *United States*, 850 F.2d 558 (9th Cir. 1988), cert. denied, 489 U.S. 1052 (1989) 6, 9, 10

Mocklin v. *Orleans Levee Dist.*, 877 F.2d 427 (5th Cir. 1989) 9, 10

Morici Corp. v. *United States*, 681 F.2d 645 (9th Cir. 1982) 7

United States v. *James*, 478 U.S. 597 (1986) 3, 5, 6, 7, 13

Zavadil v. *United States*, 908 F.2d 334 (8th Cir. 1990) 9

Statutes:

Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.* 3, 12

Flood Control Act of 1928, 33 U.S.C. 702c 2, 3, 5, 6, 8, 9, 10, 11, 12, 13

Flood Control Act of 1958, Pub. L. No. 85-500, Tit. II, § 203, 72 Stat. 310 2

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A8) is reported at 901 F.2d 79. The opinion of the district court (Pet. App. A9-A12) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 26, 1990. The petition for a writ of certiorari was filed on July 23, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner was seriously injured when he dove into a flood control lake in Illinois and struck his head on an obstacle beneath the surface of the water. The district court dismissed the complaint, holding that it was barred by the Flood Control Act, 33 U.S.C. 702c. Pet. App. A9-A12. The court of appeals affirmed. *Id.* at A1-A8.

1. Lake Shelbyville, an artificial lake located in central Illinois, is part of the Kakaskia River flood control project.[1] The Army Corps of Engineers conducts the project's flood control operations. The lake's water level fluctuates during the course of the year, rising in the spring as flood waters enter and falling in the summer and autumn as water is released by the Corps to maintain constant rates of flow through the rivers downstream. Pet. App. A3, A7-A8, A9.

The Army Corps has established recreational areas along Lake Shelbyville, including the Wilborn Creek Recreational Area. During the spring and part of the summer, an island near this recreational area is under water. The island emerges when the water falls, and the island's shoreline is altered by changes in the lake's water level. Although the island is not part of the Wilborn Creek Recreational Area or any of the other recreational areas developed by the Corps, it is a popular picnic spot. In 1983, two weeks after the island had emerged from the lake's waters, petitioner was seriously injured when he struck an underwater obstacle while attempting a shallow, racing dive near the island. Pet. App. A3.

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[1] The project was authorized by Congress in the Flood Control Act of 1958, Pub. L. No. 85-500, Tit. II, § 203, 72 Stat. 310.

2. Petitioner filed this action under the Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.*, in the United States District Court for the Central District of Illinois. The first amended complaint alleged (¶¶ 12(a)-12(f), 15(a)-15(f)) that the Army Corps had acted negligently and willfully in failing (1) to prohibit diving and swimming at the island, (2) to post or otherwise provide warnings, (3) to use due care in maintaining Lake Shelbyville, including the island where the injury occurred, (4) to remove underwater obstacles, and (5) to provide proper supervision. The district court granted the government's motion to dismiss the action, holding that the government was immune from liability under the Flood Control Act of 1928, 33 U.S.C. 702c. Pet. App. A9-A12. Section 702c provides, in pertinent part (*ibid.*):

> No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place * * *.

3. The court of appeals affirmed. Pet. App. A1-A9. The court noted the holding of *United States* v. *James*, 478 U.S. 597, 605 (1986), that the terms "'flood' and 'flood waters' apply to all waters contained in or carried through a federal flood control project for purposes of or related to flood control, as well as to waters that such projects cannot control." Thus, the court of appeals continued, "every drop of water in Lake Shelbyville is 'flood water' within the meaning of § 702c, and the statute blocks recovery if [petitioner's] injury is 'damage from or by' these waters." Pet. App. A4.

The court rejected petitioner's contention that the water in the lake had "nothing to do" with his injury. Pet. App. A4. The court explained that in this case, as in *James*, "[w]ater played some role" in the

accident, and "the responsible actors were federal employees" who had allegedly failed to take precautions to prevent injuries. *Ibid.* "Recharacterizing causes as [petitioner] proposes," the court observed, "would enable parties to avoid *James* by playing word games." *Ibid.* The court emphasized that, in *James*, this Court (*id.* at A5)

> rejected both the argument that injuries from the recreational components of a flood-control project are outside § 702c, 478 U.S. at 609-610, and a contention that losses attributable to failure to warn of hazards are not covered, *id.* at 610-12. The Court described § 702c as barring "'any' liability associated with flood control", 478 U.S. at 608, and any liability arising out of the "'management' of a flood control project", *id.* at 610.

In Lake Shelbyville, the court of appeals continued, "[f]lood-control activities increase the probability of injuries such as [petitioner's]." Pet. App. A7. The court explained that seasonal variations in the lake's water level made it difficult to identify places hazardous to divers or to post signs. "[B]ecause 'the problem' is attributable in substantial part to the nature of a flood-control project," the court reasoned, "a claim based on the theory that the Corps of Engineers should have closed the island to swimming in order to protect recreational users is the same in principle as the claim that the Corps should have closed to boaters the lakes in *James*." *Id.* at A8. The court reserved the question whether the Flood Control Act would apply to a case in which flood control activities did not increase the probability of an injury. *Ibid.*

ARGUMENT

1. The court of appeals' decision is consistent with the language of the Flood Control Act and with the Court's interpretation of the statute in *James*. See Pet. 10-15. Section 702c provides that "[n]o liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place * * *." In *James*, this Court held that the terms "flood" and "flood waters" (478 U.S. at 605):

> apply to all waters contained in or carried through a federal flood control project for purposes of or related to flood control, as well as to waters that such projects cannot control.

In this case, it is undisputed that Lake Shelbyville is part of a federal flood control project. Thus, as the court of appeals correctly concluded, "every drop of water in Lake Shelbyville is 'flood water' within the meaning of § 702c," and petitioner's injury was within the scope of the immunity conferred by that statute. Pet. App. A4.

James forecloses the contention that statutory immunity is unavailable if an injury can be attributed to recreational aspects of a flood control project. In *James*, this Court emphasized that the government's immunity under that provision extends to liability of "*any* kind * * * for *any* damage from or by floods or flood waters at *any* place," adding that it is "difficult to imagine broader language." 478 U.S. at 604. The legislative history, the Court continued, shows "that the sweeping language of § 702c was no drafting inadvertence" and that "Congress clearly sought to ensure beyond doubt that sovereign immunity would protect the Government from 'any' liability associated with flood control." *Id.* at 608.

Neither the language of Section 702c nor the reasoning of *James* permits the distinction petitioner would draw between injuries sustained while a flood control lake is "*actively involved in flood control activities*" and those "occurring as a result of the *recreational* operation of a facility not involving flood control operations." Pet. 11. Nothing in the statute ties the immunity to the nature of the activities or operations in which government employees are engaged at or before the time of an injury. Indeed, one of the decisions reversed in *James* had held that the government was not immune if "a producing cause of the damage or injury is a government employee's negligence in omissions or commissions that diverge from acts strictly for the purpose of controlling floods or floodwaters." *James* v. *United States*, 760 F.2d 590, 603 (5th Cir. 1985). This Court's decision in *James* must be taken as a rejection of that test. Similarly, *James* made clear that Section 702c extends to claims framed in terms of failures to warn recreational users of hazards on flood control lakes, explaining that "the manner in which to convey warnings, including the negligent failure to do so, is part of the 'management' of a flood control project." 478 U.S. at 609-610.

The distinction petitioner proposes is also unworkable. Recognition of that distinction would, as the court of appeals noted, "enable parties to avoid *James* by playing word games." Pet. App. A4. The Ninth Circuit has also emphasized the impracticability of attempting to distinguish "between the active and passive operations of federal flood control facilities," recognizing that "a passive condition is invariably the result of other active forces which have gone before." *McCarthy* v. *United States*, 850 F.2d 558, 561 (1988), cert. denied, 489 U.S. 1052 (1989). In this

case, the government's immunity should not be affected by whether the cause of the injury is alleged to be the design of the flood control project, operations said to expose swimmers to risks caused by underwater obstructions, a failure to warn of those hazards, or some other characterization of the government's allegedly negligent acts or omissions.

Contrary to petitioner's contention (Pet. 11-12), *James*'s passing reference—in a string citation in a footnote, 478 U.S. at 605-606 n.7—to *Hayes* v. *United States*, 585 F.2d 701 (4th Cir. 1978), does not suggest otherwise.[2] As we have demonstrated, the reasoning of *James* is inconsistent with any effort to limit the Flood Control Act to active flood control operations; the Court cannot fairly be deemed to have adopted a fundamentally different understanding of the statute by means of a footnote citing to *Hayes*. In fact, as the court of appeals noted, the same footnote cited *Morici Corp.* v. *United States*, 681 F.2d 645 (1982), a case in which the Ninth Circuit specifically rejected the *Hayes* court's suggestion that flood control immunity depends on "the particular use to which the project was being put when the negligence occurred" (681 F.2d at 647).

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[2] *Hayes* was a two-page decision reversing the dismissal of a complaint that alleged that the plaintiff's land had been eroded by releases of water from a dual-purpose dam. Distinguishing between "flooding which allegedly occurred because of the government's anti-flooding activity" and "flooding caused by a federal project unrelated to flood control," *Hayes* remanded for further proceedings because it was "not inconceivable that all or some of the releases were solely for the purpose of promoting recreational use of the impounded waters and not in the least in aid of the operation of the dam as a flood control facility." 585 F.2d at 702. The Fourth Circuit has had no occasion since *James* to elaborate upon this approach or to apply it beyond the facts of *Hayes*.

In short, the court of appeals correctly concluded that the Flood Control Act bars petitioner's claims. That determination is consistent with *James*. Especially in view of the undisputed fact that flood control operations cause the waters of Lake Shelbyville to rise and fall and thus affect the risks that underwater obstacles pose to swimmers, the reasoning of *James* supports dismissal of the action.[3]

2. There is no inter-circuit conflict calling for this Court's review. See Pet. 7-10.

This is one of six cases since *James* in which the courts of appeals have rejected claims closely analogous to petitioner's. In addition to the Seventh Circuit in this case, the Third, Eighth, and Ninth Circuits have held that Section 702c confers immunity from claims arising from alleged negligence in the operation of recreational facilities included within federal flood control projects. See *Dawson* v. *United States*, 894 F.2d 70 (3d Cir. 1990); *Dewitt*

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[3] The court of appeals noted that, as petitioner's counsel conceded during oral argument, there was no dispute that the water level of Lake Shelbyville is constantly changing. Pet. App. A8. There is thus no merit to petitioner's suggestion that the court applied an incorrect standard in affirming the dismissal of petitioner's complaint (see Pet. 6 n.3); a remand on that basis would serve no purpose; and, in any event, the point does not warrant this Court's review.

We do not concede that the Flood Control Act applies only when flood control projects have increased the risk of the injury complained of. The statute can reasonably be construed to provide the United States with broader protection from the massive liability that could accompany taking charge of waters within flood control projects. But the fact that flood control operations did increase the risk of the injury sued upon here makes this case an inappropriate vehicle for determining the outer boundary of the immunity conferred by the Act.

Bank & Trust Co. v. *United States*, 878 F.2d 246 (8th Cir. 1989), cert. denied, 110 S. Ct. 1318 (1990); *Zavadil* v. *United States*, 908 F.2d 334 (8th Cir. 1990); *McCarthy* v. *United States*, *supra*.[4] Similarly, in *Mocklin* v. *Orleans Levee Dist.*, 877 F.2d 427 (1989), the Fifth Circuit held that Section 702c barred a claim against the government arising out of a drowning in a channel that had been dredged to facilitate the movement of equipment needed for the construction of flood control levees.

Like the decision in this case, each of those decisions concluded that the waters in which the injuries occurred were "flood waters" for purposes of Section 702c; each also held that the statute, as construed in *James*, conferred immunity on the government notwithstanding allegations that injuries resulted from negligence wholly unrelated to flood control. Pet. App. A4, A6-A8; *Dawson* v. *United States*, 894 F.2d at 73-74; *Mocklin* v. *Orleans Levee Dist.*, 877 F.2d at 428-430 & n.6; *Zavadil* v. *United States*, 908 F.2d at 335-336; *Dewitt Bank & Trust Co.* v. *United States*, 878 F.2d at 247; *McCarthy* v. *United States*, 850 F.2d at 561-563. In two of these cases, *McCarthy* and *Dewitt*, this Court denied petitions seeking fur-

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[4] In *McCarthy*, the plaintiff was seriously injured when he dove into shallow water at a recreational area on a lake created as part of a flood control project. The Ninth Circuit affirmed the dismissal of the complaint. In *Dewitt*, the Eighth Circuit reversed an award of damages against the government for injuries to an individual who dove into shallow water at a beach on a flood control lake. Similarly, in *Dawson*, the Third Circuit affirmed the dismissal of two actions arising from drownings at a swimming area in a flood control lake. In *Zavadil*, the plaintiff was injured when he struck a submerged concrete boat ramp while diving from a dock located on a flood control lake.

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ther review of the same question as that advanced by petitioner here.

Contrary to petitioner's contention, these cases cannot be subdivided between decisions adopting a "mechanical" interpretation of Section 702c and those taking a "functional" approach. See Pet. 7, 10 & n.4. Like the court of appeals in the instant case, the Third, Fifth, Eighth, and Ninth Circuits have noted that flood control operations contributed to the hazards underlying the plaintiffs' injuries.[5] There is no significant divergence among these courts' interpretations of Section 702c, and the Seventh Circuit's decision is not "novel" (Pet. 10).

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[5] See *Dawson* v. *United States*, 894 F.2d at 74 (noting that "daily variation in the water depth * * * was in part due to releases by the Corps for flood control purposes"; thus, " 'governmental control of flood waters was a substantial factor' in causing" the accident); *Mocklin* v. *Orleans Levee Dist.*, 877 F.2d at 428-430 & n.6 (noting that it was "clear * * * that the water in the flotation channel causally did contribute to the [accident]"; a channel dredged to facilitate construction of the flood control project at issue "created a significant dropoff in the lake"); *Zavadil* v. *United States*, 908 F.2d at 336 & n.4 ("at the time of the accident the water level was being monitored for flood control and navigational purposes" and "governmental control of these waters was a substantial factor in causing [the plaintiffs'] injuries"); *DeWitt Bank & Trust Co.* v. *United States*, 878 F.2d at 247 ("In operating the project for flood control and navigation, the Corps maintained the waters at this shallow level. Thus, governmental control of flood waters was a substantial factor in causing [the plaintiff's] injuries."); *McCarthy* v. *United States*, 850 F.2d at 561 (noting that "[a]lthough [plaintiff's] injury did not result from a perceptibly active operation of the flood control facility, the record does indicate ongoing monitoring and discharge of water levels at the Lake, activities which even formed part of [the plaintiff's] complaint for negligence").

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As petitioner notes, the Tenth Circuit has held that imunity was unavailable in a case arising from recreational activities on a flood control lake. *Boyd* v. *United States*, 881 F.2d 895 (1989). In *Boyd*, a swimmer snorkeling in a flood control lake was struck and killed by a power boat; his complaint alleged that the government was negligent in failing to warn swimmers that boating was permitted in the area in which the accident occurred and in failing to zone the lake to prohibit boating in that area. The court of appeals concluded, *inter alia*, that Section 702c did not bar the suit. The court criticized the standard applied by the Ninth Circuit in *McCarthy* —a standard the *Boyd* Court characterized as creating a " 'but for' connection between flood control activity and damages occurring at a flood control project." *Id.* at 900. That standard was not consistent, the Tenth Circuit stated, with its view that the concern underlying Section 702c was "to shield the government from liability associated with flood control operations * * * not liability associated with operating a recreational facility." *Ibid.* At the same time, the court's holding in *Boyd* was very narrow (*ibid.*):

> Without attempting to delineate for every conceivable situation the necessary link between flood control activities and injuries sustained at a flood control project before § 702c immunity applies, in the present case we hold that the requisite nexus has not been established.

Any conflict between *Boyd* and decisions in other circuits does not call for this Court's review. The holding in *Boyd* was limited expressly to the facts of that case. As the court of appeals recognized in the instant case, *Boyd*'s facts are distinguishable from those of the other cases cited in the petition, since the

injury involved in Boyd was not attributable to management of waters in a flood control lake. See Pet. App. A6. Thus, it is by no means clear that petitioner would prevail on the facts of this case in the Tenth Circuit. Moreover, since *Boyd* was decided, there have been a number of decisions in other circuits that have explained why cases like this one involve "liability associated with flood control operations" (881 F.2d at 900). As these courts have recognized, the government's ongoing monitoring and regulation of water levels in flood control lakes is a "substantial factor" in causing injuries in those lakes. See note 5, *supra*. If called upon to apply Section 702c in the future, the Tenth Circuit is unlikely to disregard the emerging consensus reflected in those cases. The court could well conclude that this "substantial factor" referred to by these courts provides the undefined "link" or 'nexus" (881 F.2d at 900) required by *Boyd*—or could decide to elaborate on *Boyd*'s relatively brief discussion of Section 702c so as to lay to rest any potential conflict.

The Fourth Circuit's decision in *Hayes* v. *United States*, *supra*, upon which petitioner also relies to support its claim of inter-circuit conflict (Pet. 7), was decided before this Court's decision in *James*. Since *James*, the Fourth Circuit has not had occasion to consider the significance of that decision or to apply Section 702c. Under these circumstances, there is no need for this Court to address any potential conflict between *Hayes* and decisions of other courts of appeals.

3. Petitioner asserts (Pet. 15-17) that the court of appeals' decision is inconsistent with the purposes of Section 702c and the subsequently enacted Federal Tort Claims Act. However, as petitioner acknowl-

edges, the purpose of Section 702c was "to ensure beyond doubt that sovereign immunity would protect the government from 'any' liability associated with flood control." *United States* v. *James*, 478 U.S. at 608. And, as this Court observed in rejecting a similar appeal in *James*, "If that provision is to be changed, it should be by Congress and not by this Court." *Id.* at 612.

Since *James*, all of the courts that have considered the question (with the possible exception of *Boyd*) have rejected petitioner's proposed resolution of the issues presented by this case as unworkable and inconsistent with this Court's interpretation of the statute. Under these circumstances, we submit that the question of Section 702c's applicability to accidents of the type at issue here does not warrant this Court's attention.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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